IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE BRANGIER,	)	
Defendant-appellant,	)	
vs.	)	No. 18789
JOHN B. ROSENTHAL,	)	
Plaintiff-appellee.	)	
	)	

REPLY BRIEF for APPELLANT

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Honolulu, Hawaii

Attorney for Defendant-Appellant

Of Counsel:

SMITH, WILD, BEEBE & CADES

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REPLY BRIEF FOR APPELLANT

STATEMENT OF FACTS

Appellee's references "supporting each statement of fact" (Rule 18(2)(c) wholly fail to point to evidence from which this court can determine (a) the terms of the fee simple contract forming the basis of the suit; (b) the terms of the alternative lease-mortgage "agreement" on which damages have been awarded; or (c) the basis for the excessive damages awarded (which actually exceed the price paid for an unconditional approved transfer of the fee simple title to the land). (R-161). The record references for many of the most important of Appellant's "facts" are solely to the opinion of the trial court,[1] which is disputed on this appeal, both as to findings of fact and conclusions of

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(1) Examples: The fact that Brangier did not have a right to impose payment in advance as a condition (Appellee Br.p.16), or the "fact" that Rosenthal had a right to insist on a side agreement. (Appellee Br.p.17). Likewise, Appellee's Br.pp. 18, 21, 22, 23, 24 and 25.

aw. Space restrictions in this reply brief will not permit omment upon each point of disagreement, but many of the essential acts in dispute will be discussed hereafter.

A brief chronology will aid the court and also demonstrate how clearly Appellee has failed to meet the necessary urden of proof:

April 16, 1958 -- Written offer relating to fee simple sale of land requiring governmental consent for $35,000 with $10,000 down with balance in about three weeks (Exh. P-3);

April 17, 1958 -- Instructions to Rosenthal to send $25,000 to bank in Honolulu (Exh. P-5);

April 24, 1958 -- Conditional acceptance of offer (Exh. P-6, R-91);

April 25, 1958 -- Rosenthal writes if "for any reason, the sale as contemplated is not effected, $10,000 is to be returned" (Exh. P-2);

April 28, 1958 -- Brangier asked Rosenthal to "send balance in near future" (Exh. P-8);

May or June, 1958 -- Application made for government consent which is refused (R-116-118);

October 30, 1958 -- Rosenthal writes that after discussion in Tahiti he will try to have "ready to go" procedure. (Exh. D-20);

Brangier's arrangement with Rosenthal is that money is to be paid in Honolulu (R-125);

June to Fall, 1959 -- Rosenthal goes to Tahiti to obtain government consent. (R-172, 173, 217, 218).

" Rosenthal's application for fee simple consent is denied. (R.213-215).

January 29, 1960 -- Brangier offers to modify agreement to a mortgage-lease if Rosenthal pays in advance and deposits the money in Honolulu. (Exh.P-19).

February to September, 1960 -- Rosenthal is not satisfied as to tax and other legal consequences concerning the lease-mortgage (Exh. D-27); and "negotiations" continue on details of this alternative contract (Exh. D-22, D-34) but always on condition that there be an advance deposit of the full price. (Exhs:P-18, P-19, D-24, D-25, D-26, R-158-160).

" Rosenthal insists on a side United States agreement (Exhs: D-27, D-33, D-36);

" Says he can deposit $25,000 but wants to "predate the check". (Exh. D-23).

February 11, 1960 -- Brangier advises Rosenthal's attorney the first step is to deposit $25,000.

September 25, 1960 -- Negotiations are still not concluded and situation seemed hopeless (R-357).

October 4, 1960 -- Brangier cancels the original agreement and returns the $10,000. (Exh. P-25).

October 24, 1960 -- Rosenthal again makes application for government consent (R-216).

October 25, 1960 -- Rosenthal advises Brangier he will make payment only when escrow arrangements (meaning the side United States agreement and all details concerning the lease-mortgage are completed). (Exh. D-38).

January 9, 1961 -- Admission by Appellee's California attorney that he had "apparently overlooked" sending either the deposit of $25,000 or the escrow instructions to Appellant's Honolulu attorney. [Appellee admitted that he never deposited the $25,000 with his California attorney (R-258)].

March 8, 1961 -- Conditional consent of the governor to application of Rosenthal.

June, 1961 -- Property sold by Brangier in unconditional fee simple to third parties for $45,000.

March 23, 1963 -- Trial court awards "loss of bargain" damages (under "either California or Hawaiian law") based solely upon evidence of the value of the fee simple title.

REPLY TO APPELLEE'S ARGUMENT

. NOTICE OF INTENT TO TERMINATE AND DEMAND FOR PERFORMANCE WAS GIVEN BY BRANGIER.

Appellee argues that Brangier did not terminate the riginal contract because he gave no notice thereof, and made no emand for performance by Rosenthal.

But the substance, not the form of a notice of intention

o terminate is the essence of the legal requirement of notice nd demand. Thus the notice may be by actual declaration of escission or by acts brought to the other's knowledge amounting n law to such a declaration. [Pittsburg Plate Glass Co. v. arrett, 42 F.Supp. 723, 730, (D.C. Ga.)]. The purpose of such otice is to give the other party reasonable opportunity to erform -- to complete whatever had been performed.(2) Rosenthal reated Appellant's letter as both a notice and a demand for erformance, because just two weeks later he on his own behalf pplied for the Governor's consent to a fee simple transfer R.216), and at the same time wrote to Brangier demanding a ease-mortgage, saying that he was instructing Cades to prepare n escrow agreement "as previously desired by you", and also say- ng that Cades would get the $25,000 "to be paid to you as soon s the escrow" was completed. (Exhibit D-38).

Thus, Rosenthal took and treated Brangier's letter of ctober 4, 1960 (Exhibit P-25) as a notice of intent and as a emand for performance. But Rosenthal still never performed: he governor's conditional consent (which would have required a llateral modification of the contract to be acceptable) was ot given until over five months after Brangier's notification etter and almost three years after the original contract. ades did not get a copy of Exhibit D-38 until over two months ater, and Rosenthal never placed the $25,000 with Cades in

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2) The record is replete with evidence that Rosenthal would not deposit $25,000 except on his own terms and conditions; that at no time was Brangier in a position to enforce the original or the alternative contract against Rosenthal and thus, mutuality was completely lacking. See Exh. P-30 (Depos. of Rosenthal).

escrow as was expressly required under the alternate lease-mortgage proposal. [See Op. Br. p.13, fn.8.] Appellant therefore submits that the required notice of rescission was given, and, as is set forth in Op. Br. Point I, that Brangier had the right to withdraw his offer of lease-mortgage and to cancel the original agreement, which was done by his letter of October 4, 1960.(3)

I. PERFORMANCE BY BRANGIER WAS EXCUSED BECAUSE OF IMPOSSIBILITY.

(a) The Original Contract: Before the original offer to transfer the fee simple title to this property was made Appellant had an opinion from his Tahiti attorney that there would be no difficulty in obtaining the required government's consent because both parties to the transfer were non-resident Americans (Exhibit P-5). Appellant passed on this information to Appellee by his letter of April 2, 1958 in which he said "You asked me to advise you as soon as I heard from Tahiti. There will be no problem in having the title to my property transferred to your name". (Exhibit P-1). So, it is clear that from the beginning, as found by the Court (R-35), both parties considered the consent of the governor to be a foregone conclusion and that there

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(3) Appellant's position that "negotiations" could not be broken off (Appellee's Br.p.4) is a judicial admission that an enforceable contract was not at any time in effect after the French Government had refused fee simple transfer to Appellee, and mutuality was completely lacking from and after said refusal. See Appendix A for further judicial admissions in Appellee's opening statement which again clearly demonstrates that the "negotiations" concerning the lease-mortgage never were finalized into an enforceable agreement.

ould be "no trouble" on that score. (R-363).

Appellee, on page 12 of his brief, argues in support f the erroneous finding of the trial court that as a result of he above facts Brangier "warranted" the approval of the governor nd that the failure to obtain the required consent within a easonable time did not constitute an excuse for appellant's on-performance on the grounds of supervening impossibility. R-79). Appellee argues that the possibility of a failure to btain the consent was foreseeable, and that Appellant, in order o protect himself, should have expressly provided in the con- ract against such a contingency. The question as to whether ppellant "warranted" the approval of the governor (i.e. undertook o pay the loss of bargain damages if such approval was not forth- oming,) is a question of law since the facts on this point are ot disputed.(4) The trial court's holding was and is reversible rror as is shown by the following authorities:

In the case of L. N. Jackson & Co. v. Royal Norwegian overnment, 177 F2d 694 (2d Cir. 1949) plaintiff had contracted ith the defendant shipowner to transport a cargo of copra. The ontract was made just prior to the entry of the United States nto World War II. The defendant had previously agreed with the nited States Maritime Commission to operate the ship pursuant

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4) Rosenthal testified (Ex.P-30, p.19) "I think it was anticipated that there would be a problem in obtaining authorization of the transfer by the French Government. They had a long-standing policy not to allow foreigners to acquire land." Appellee's reliance on Exh.P-1 as entitling him to damages for loss of the bargain because of the government's refusal of consent is not supported by the applicable law, as is more fully discussed hereinafter.

to a system of ship warrants which gave the Maritime Commission the right to control the movement of the ship and also the cargoes which it might carry. Pursuant to the directions of the Maritime Commission defendant was caused to breach its contract with plaintiff and in the resulting litigation pleaded "supervening impossibility" as a defense. Plaintiff was successful in arguing that defendant should have in the contract expressly protected itself against governmental intervention. However, the appellate court reversed on the ground that this requirement put too great a burden upon the promissor, and cited many authorities showing that to follow the trial court's view to its logical limit would be to destroy the doctrine of supervening impossibility. The court further said:

> "Whether or not these authorities go so far as to state a definitive rule of preferred interpretation, they do certainly suggest that, <u>where the external circumstances present a case for the fair operation of a rule excusing performance, that shall not be denied unless the fault in not providing against it seems clear and unilateral</u>. We think the court below placed too heavy a burden upon the defendant and that fairness and justice require the acceptance of the excuse as being both compelling and beyond the terms of the defendant's obligation, properly considered." [177 F2d.p.699] (emphasis added).

The court observed that both plaintiff and defendant were aware of the possible failure of the government to allow plaintiff's cargo to be transported and that, as a result

" ... <u>there was no arbitrary obligation on the defendant to protect itself by express stipulation against the operation of the system</u>". (p.700). Thus, the court expressed the general

rinciple that where both parties are aware of the required ful-
illment of a condition precedent in order that their contract
e carried out, such a condition is an implied part of the con-
ract and need not be written into it. This principle was recog-
ized by Justice Holmes in the leading case of the Kronprinzessin
ecile, 244 U.S. 12, 24, 37 S.Ct. 490, 492, 61 L.Ed. 960, where
e made his famous statement that the contract "... embodied
imply an ordinary bailment to a common carrier, subject to the
mplied exceptions which it would be extravagant to say were
xcluded because they were not written in. Business contracts
ust be construed with business sense, as they naturally would
e understood by intelligent men of affairs." (Emphasis added).

Appellant submits that under the facts in this case,
here both parties were admittedly aware of the requirement of
he consent of the French government to the fulfillment of their
ontract, that such a consent was an implied condition precedent
o Appellant's duty to perform and that "it would be extravagant
o say it was excluded from the contract because not written".(5)

Both Appellant and Appellee did everything within reason
o secure the governor's consent, which was a condition prece-
ent to the operation of their agreement. For over two years
his consent was repeatedly refused. Thus after the passage of
uch more than a reasonable time and on advice of counsel (Exh.
24 & 25), the Appellant terminated the original contract on

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5) It is noteworthy that Appellee refers to no authorities, Hawaiian, Californian, or general to the contrary.

he ground of intervening impossibility. Under these circumstances ppellant, in good faith, had legal cause to take this action nd the trial court's denial of his right to do so constituted rror as a matter of law.

(b) The Lease-Mortgage Proposal: Appellee sued on a ontract which was impossible of performance and properly ter- inated (R-193), yet at page 16 of his brief he complains that rangier had no right to impose the condition in the modification r alternative lease-mortgage proposal of January 29, 1960 that he $25,000 be deposited in escrow. This condition was part and arcel of Brangier's offer of an alternative proposal or contract hich was prompted by the then obvious fact that the required pproval of the government had not been obtained, and in all iklihood, would not be forthcoming in the foreseeable future. rangier had every right to condition this new offer with the equirement that the $25,000 be first deposited as one of the ts required for its acceptance. Rosenthal would have this court elieve he was ready (R-182 to pay and that the money was "on hand" -182) even in the face of his persistent refusal to make any mmitment or payment without side agreements, tax understandings, ll provisions and the many other factors which were subjects "negotiations" between the parties right up to the date of ppellant's termination of his proposed offer. Brangier had ver been obligated to enter into a lease-mortgage agreement fore this time, and his offer to do so could certainly be con- tioned in any manner he might reasonably impose. Since his nd had been tied up for approximately two years it is under-

tandable that Brangier would so condition his new proposition s to insure his being promptly paid. At any rate, there is no ispute in the record about the fact that Rosenthal did not ither pay the money into escrow, as the condition in the offer equired, nor did he make a timely tender of the money [as he ffered to prove -- but completely failed to do (R-112)], and nat he therefore never made an effective acceptance of the aid offer. Appellee argues, at p.13, that Rosenthal was ttempting to put the lease-mortgage arrangement into effect rior to the time Brangier cancelled. How was Rosenthal "trying o put into effect"? By trying to get Brangier to sign a lease-ortgage without payment of the $25,000 balance? The payment f the said balance into escrow was an express condition prece-ent to Brangier's duty to sign a lease-mortgage. (Exhibits -18 & 19). Did Rosenthal encourage any agreement by consis-ently refusing to give Cades the required escrow instructions, r by inserting the requirement (in fact a counter-offer) that here must be a U.S. supplemental agreement concerning the exchange" of the property? (Exhibit D-29). The terms of rangier's offer were unequivocal; the uncontradicted evidence hows that Rosenthal never complied with these terms, and there-ore, by virtue of the basic law of contracts, no contract r mutually enforceable understanding ever resulted between the arties with respect to the lease-mortgage proposal.

II. THE ESCROW PROVISIONS.

As authority for his position, Appellee cites at great ength the very findings of the lower court which are disputed

by the Op. Br., pp 35-41 and also quotes as authority some of the lower court's erroneous findings concerning the proposed "escrow" and "U.S. Supplement" arguments.

The Appellee's brief fails to refer to proof of any kind on which the trial court could have based his finding that something called a "normal type" escrow was intended; the record indicates the opposite. The complexity of the lease-mortgage device made it impossible for anyone to draw any agreement in the absence of a meeting of the minds as to how the parties would proceed. In the face of Rosenthal's doubts and misgivings which resulted in "negotiations" continuing right up to October 4, 1960 (Appellee's Br.p.4), it is obvious that the trial court has overlooked the fact that there was no "arrangement", "agreement" or "understanding" that Brangier could have enforced against Rosenthal at any time.

With this obvious lack of mutuality, it is clear that the lower court found that the parties "intended" something entirely opposite to what their own actions and correspondence showed.

V. EXHIBIT D-23. FINDINGS BY THE TRIAL COURT ARE CLEARLY ERRONEOUS.

Appellant will stand on the wording of Exhibit D-23 itself to support his position that the exhibit was not an acceptance of the lease-mortgage proposal, as the lower court erroneously found. True, as far as Brangier was concerned he believed that he was obligated, that there was an agreement (R-132). But nowhere in the record is there support for the finding and conclusion that Rosenthal ever accepted Brangier's lease-mortgage offer. Indeed, the record shows just the contrary, as discussed

bove and in Op.Br. pp 41-44. Thus, Brangier's mistaken opinion s to the legal effect of the facts must give way to the evidence hich shows a complete lack of mutuality -- that Brangier's offer f a lease-mortgage, to be accepted by the deposit of $25,000, as never accepted, and that a contract did not result.

. THE CONFUSION BETWEEN "ESCROW" AND "U.S. SUPPLEMENT".

Appellee argues that any confusion by the court was of o significance, because "the parties did agree to the lease-ortgage arrangement, and were actively discussing either in per-on or through authorized representatives, the way or manner of onsummating such agreement ...". (Appellee's brief p.29). ppellant submits that this is mere playing with words: If he "arrangement" had been agreed upon, why the need to discuss ne "manner of consummating such agreement"? Appellee's own etailed memorandum of matters requiring resolution (Exh.D-27) efore the alternative lease-mortgage agreement could be con-(6)
ummated removes all doubt on this point.

[. THE REFUSAL TO ALLOW IMPEACHMENT OF PLAINTIFF.

Appellant cites Rule 61, Federal Rules of Civil Pro-

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6) Furthermore, on January 29, 1960, Appellant wrote Rosenthal -- "If you are not in a position to write a check for $25,000 have the money transferred to Cades in some manner" (P-18); he also wrote to his Tahiti attorney, "before you go ahead with the papers Rosenthal must deposit the balance due me in escrow ..." (P-19). The entire record shows the Appellant's willingness for over two years to sign documents once the deposit of $25,000 was made.

edure, in support of his position. Appellant has shown in his pening brief specifically how, why, and in what way he was lenied substantial justice by being refused the right to corss-xamine Rosenthal as to why he had failed to list either the ahiti land or the Tahiti contract in his sworn schedule of ssets filed in his California divorce proceeding. The cases ited by Appellee have no application because they pre-date the doption of the Federal Rules of Civil Procedure.

II. THE AWARD OF DAMAGES WAS IMPROPER AND EXCESSIVE.

At pages 32-35 of Appellee's brief, he falls into the ame error, in discussing the proper award of damages in this ase, as did the trial court.

There can be no argument but that the trial court ecognized the existence of two separate agreements between the arties concerning the transfer of the land (R-194). The orig-nal agreement contemplated a fee simple transfer of the title rom Brangier to Rosenthal approved by the French government. his consent was not forthcoming for over two years after the riginal agreement was made, despite the best efforts of both f the parties. The second "agreement" as found by the court, ame into being simply because of the frustration or impossibility onnected with the first agreement. This second agreement was he lease-mortgage proposal which the trial court found would onvey "... a much inferior title to that he [Brangier] had nconditionally covenanted to convey, but which Rosenthal was illing to accept in view of the Governor's refusal to approve fee simple sale (R-76).

There is no evidence in the record to even indicate, much less prove, any bad faith on Appellant's part in entering into the original agreement to convey in fee simple, or that the failure to obtain the consent of the French government was in any way due to lack of diligence or good faith on his part. The significance of this last stated fact is extremely important in this case because it is directly related to the erroneous measure of damages applied by the trial court. In the trial court's opinion (R-79) we find the following:

> "Moreover, this court holds that the parties intended the executory contract at least to be governed by the laws of California or Hawaii, rather than the laws of France or Tahiti, and under such laws, the right to damages for breach of such an executory contract, and the validity of such executory contract, would not be affected by impossibility of securing the French government's consent."

Appellant submits that even assuming arguendo that the right to damages conceivably might not be affected by the impossibility of securing the French government's consent, certainly this fact would affect the measure of damages to be applied to the case. The damages awarded Appellee by the trial court were measured by Appellee's alleged "loss of bargain" (see Appellee's Br.p.5). Such a measure of damages is applicable under the majority rule (no cases have been found on this point in Hawaii) and the California law only in situations where the proof shows that the vendor failed to convey property as a result of his bad faith. In 55 Am.Jur. 951 Vendor and Purchaser, 557. This rule is set out as follows:

> "In many jurisdictions a distinction is made as regards the general damages recoverable by the purchaser under a land contract when the vendor is unable to convey between cases where the vendor acts in good

faith in entering into the contract and those in which good faith is wanting. While it is generally recognized that the purchaser is entitled to recover the difference between the value of the land and the agreed price, to recover for the loss of his bargain, where the vendor cannot be said to have acted in good faith, it is held, in cases where the vendor does act in good faith, that the measure of damages is the amount of the purchase money paid, with interest, thereby denying to the purchaser any recovery for the loss of his bargain. This is the rule laid down in the early English case of Flureau v. Thornhill, 2 W.Bl. 1078, 96 Eng. Reprint 635, decided in 1776 and subsequently followed in that country, and adopted in a majority of jurisdictions in this country and in Canada." (emphasis added)

The majority rule has been codified in California

nd is §3306 of the California Civil Code, Annotated:

"Breach of agreement to convey real property. The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land". (Emphasis added)

Since the trial court expressly found that "... the

arties intended the executory contract at least to be governed

/ the laws of California or Hawaii ..." (R-79), Appellant

ubmits that the above quoted law governs the assessment of

amages in this case. Now, as mentioned above, there was no

roof, or any finding by the trial court, that Appellant, by

rtue of bad faith, failed to abide by his original agreement

o convey the fee simple title. All of the evidence shows that

oth Appellant and Appellee did their best to obtain the requi-

te approval of the French government, but that for over two

ears, from the date of the original agreement until Appellant's

escission, this consent was refused despite all efforts made.

This being the state of the record, it must follow that the trial court did not, and could not under applicable law, award damages for any breach of the original contract based on a measure of "loss of bargain". It follows then that the "loss of bargain" damages which were awarded had to be for the alleged breach of the second agreement which was the lease-mortgage proposal involving a title "much inferior" to the fee simple title (R-76).

Furthermore, with respect to the original agreement to transfer the fee simple title, damages measured by "loss of bargain" could not properly have been awarded because from the inception of the negotiations concerning this contract both parties knew that Appellant could not perform unless the consent of a third party (French government) was obtained. It has long been the law that when a vendee knows at the time of entering into a contract for the purchase of land that his vendor does not have present title, or that the vendor's ability to convey is dependent upon the assent or cooperation of a third party, then in the event of the vendor's default because of a good faith failure to obtain title or the required consent of the third party, the measure of damages would be the amount paid plus expenses and interest; no "loss of bargain" damage is awarded under such circumstances. See Garcia v. Yzaguirre, --Tex.---, 213 SW 236 (1919); Northridge v. Moore, 118 N.Y. 19, 23 NE 570 (1890).

Also on this point, Appellant cancelled the original fee simple agreement in reliance on the advice of legal counsel. (P-24 & P-25). The governing California law is that a vendor

so acting cannot be held in bad faith, and under CCA Sec.3306, supra, "loss of bargain" damages may not be awarded. See Fox v. Iced, 317 P2 608 (Supreme Court of Calif., 1957).

Looking again at the trial court's opinion we see that the only "bad faith" found with respect to Appellant's actions relates to the lease-mortgage proposal.

> "... Brangier was unable to deliver clear title through governmental consent, and since as Brangier himself testified, government consent was not required to the lease-mortgage type of transaction, and since further, Rosenthal was willing to accept the lease-mortgage type of transaction, there was no impossibility in fact, but only one dreamed up by Brangier for his convenience." (R-78) (7)

The court regarded this situation as showing "double dealing" by Appellant and also bad faith (R-78). However, this bad faith" has only to do with the alleged second agreement between the parties which involved the lease-mortgage proposal.

Assuming the existence of such an agreement, as did the trial court, a finding of bad faith concerning its breach would, under the applicable law, authorize the court to make

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7) This is the clearest indication that the court awarded damages on the basis of Brangier's refusal to enter into the lease-mortgage type of transaction; which Appellee urges (Br.p.12,13 and the court finds Rosenthal was willing to accept (R-67). However the court has completely overlooked the fact that at no time was there a meeting of the minds between the parties as to how this transaction could be carried out in a manner acceptable to Rosenthal, in the face of his persistent refusal to release the money until the "arrangements" had been completed. It is impossible to find damages for breach of executory contracts under Taihitian law, California law, or Hawaiian law, whichever applies under the conflict of law principle, where there is no contract to begin with. Under the conflict of law rule relating to contracts for transfer of land Tahitian law or the lex situs would be applicable (Minor, conflicts of laws §11 (1st ed. 1901) but there is a complete absence of proof in the record as to foreign law other than the statement in Exhibit P-25.

an award of damages to Appellee measured by his "loss of bargain" for breach of the lease-mortgage agreement. But this was not done in this case. The court awarded damages measured by "loss of bargain", to be sure, but the award was based on evidence which had solely to do with the value of the fee simple title of the property. There is not one single word of evidence which would go to show the value of the "much inferior title" arising under the lease-mortgage proposal which the court found that Appellant had breached in bad faith. In 55 Am.Jur. 951, Vendor and Purchaser, Sec. 556 the editors state:

> "The value of the fee simple estate in the land is not to be considered if the agreement to convey would be satisfied by the conveyance of a lesser estate". See Rohr v. Kendt, 3 Watts & S(Pa) 563, 39 Am. Dec. 53.

The trial court has expressly found that Appellee "... was willing to accept the lease-mortgage type of transaction ..." (R-78) and therefore the error in using fee simple value as a measure of damage for breach of the lease-mortgage (much inferior title) agreement is readily apparent.

It is submitted that the measure of damage in this case is governed by the majority and California law set out above. The record shows: (1) no bad faith on Appellant's part regarding the original fee simple agreement, (2) both parties knew of the requirement of the French government's consent from the beginning, (3) Appellant cancelled this agreement on advice of counsel, (4) the Appellee was willing to accept a "much inferior" title pursuant to the lease-mortgage arrangement, and (5) the trial court only found a "bad faith" breach with respect to the alleged lease-mortgage agreement. In the light of these

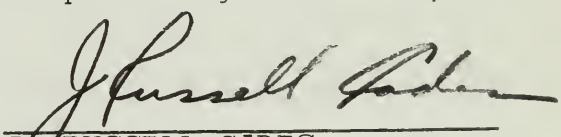
facts the "loss of bargain" measure of damages used by the court could only apply to the alleged breach of the lease-mortgage proposal. It was, therefore, prejudicial error for the trial court to base his findings solely on the value of the fee simple title in attempting to award a "loss of bargain" recovery for the breach of the lease-mortgage agreement.

There was no evidence at all regarding the value of the "much inferior" lease-mortgage title and consequently the award to Appellee finds no support in the record. The trial court's failure to apply a proper measure of damage and also the use of irrelevant evidence upon which to base the award is clear error, and highly prejudicial to Appellant. The judgment below, must therefore be reversed so as to prevent manifest injustice.

CONCLUSION

For the reasons stated above and in the opening brief for Appellant the judgment entered below must be reversed.

Respectfully submitted,



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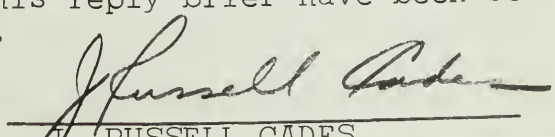
CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and that three copies of this reply brief have been served upon Appellee this March 30, 1964.



J. RUSSELL CADES

APPENDIX A: Appellee's Opening Statement

MR. FLYNN: I would like to make a brief opening tatement, if the Court please.

This case involves a contract for the sale and purhase of land in Tahiti, the contract having been made during he month of April, 1958.

There were many complications involved in the carrying ut or consummating of the contract, and by reason of that a umber of discussions and conversations took place between the arties themselves and between the parties through their repreentatives for a period of approximately two years.

One of the complications, if not the principal one in he consummation of the contract, was the requirement of the rench Government over its Polynesian possessions, that there be he consent of the Governor of Tahiti for certain transactions n the sale of real property.

In the course of handling the details of performance f the contract on the part of both sides, it developed that the overnor's consent was applied for, and at one time, possibly on wo occasions, whether formally or informally or both, refused. nd in the course of appealing that decision of refusal, and in he course of continuing with discussions as to methods and ways nd means of carrying out the existing contract between the arties, there came up a practice or procedure apparently well nown in Tahiti and well known to the defendant, and then became ell known to the plaintiff, a procedure that may be described s a lease and mortgage transaction, with the lease having in its [illegible] promise of sale

THE COURT: What is that, now?

MR. FLYNN: A transaction that may be described as a ease and mortgage, with the lease having in its terms a promise sale or an option in the lessee to buy, and the option in- luding the right to transfer such option to any other party, ny other person, the lease being for a term of less than ten ears, or specifically nine years and three hundred sixty days, ne reason for that being that the French law had certain pro- isions applicable to leases over ten years in duration.

It was fully agreed by the parties, both personally nd through their various agents and attorneys, that the trans- tion would be carried to a conclusion with this method, at ne same time being agreed that continued efforts would be made obtain the consent of the Governor of Tahiti.

While this portion of the entire transaction, or this rtion of the proceedings during the years in question, took ace in January and February of 1960 --

THE COURT: What is that, what took place?

MR. FLYNN: This portion of the story having to do with e lease mortgage because of the then existing refusal of the vernor of Tahiti to consent to transfer-- in the course of the xt several months --

THE COURT: Took place when?

MR. FLYNN: In January and February.

THE COURT: What year?

MR. FLYNN: Of 1960. And in the next several months e parties continued to work out the transfer by this means. included obtaining governmental, Tahitian governmental approval

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f payment, the matter of the exchange rules and laws of the overnment there, and a consent was required for putting into ahiti and entering into a transaction there involving the payent of $25,000 as the balance of the price agreed upon between he parties, the full principal sum being $35,000, of which 10,000 had been deposited by the plaintiff with the defendant n 1958, April of 1958.

While these details were being brought to a conclusion, on or about October 4 of 1960, the defendant wrote a letter to he plaintiff purporting to cancel their entire agreement.

THE COURT: What date was that?

MR. FLYNN: October 4, 1960.

THE COURT: Yes.

MR. FLYNN: A letter purporting to cancel their entire greement on the ground that the April of 1958 contract, or letter greement, contained a statement by the plaintiff that if the ansaction couldn't be completed, any monies paid by him were to returned to him.

This, it is our contention, was -- may be described as ying to lift oneself up by the bootstraps on the part of the fendant, as there was, right at the very time he was purporting cancel the contract by a 1958 sentence in a letter, there was existing and working arrangement for the completion of the ansaction by the lease mortgage arrangement I have described to e Court.

The plaintiff immediately notified defendant that his rported cancellation was of no effect, that there was a valid d existing contract between them, and the plaintiff demanded

erformance of the contract, the existing contract between them. laintiff's agent had approximately at the same time notified the efendant to come and sign the documents which would carry through he lease mortgage transaction to a conclusion. Plaintiff had otified the defendant and the defendant's representatives, or gents, that the $25,000 balance was ready for payment immediately, n accordance with any instructions they would give, and the laintiff demanded, as I say, performance on the part of the efendant, and tendered further performance on his own part.

In the course of the next several months the parties nd/or their counsel and representatives exchanged views and etters on the purported invalidity or the alleged validity or lleged invalidity of the contract between the parties. Demands or performance were continually made by and on behalf of the laintiff, and in either February or March of 1961 the then pending equest to the Governor of Tahiti for approval was granted. And n the ensuing weeks from and after March of 1961, representatives f the plaintiff continued preparation of documents which would hen effectuate the, what we might say, fee simple sale, as dis- nguished from the lease mortgage type of arrangement I have escribed, and again made demand on defendant for full performance, hich was refused, and which continued to be refused until the date, oday.

Plaintiff has at all times been ready and willing to erform fully, has made demands upon the defendant for such per- ormance, and demand has been refused.

APPENDIX B: Cross-Examination of Appellee Concerning Alleged "Deposit" of Purchase Money

CROSS-EXAMINATION (continued)

MR. CONKLIN:

Q Mr. Rosenthal, handing you Defendant's 4 and Defendant's Defendant's 5 was enclosed by you with Defendant's 4, isn't at correct?

A Excuse me. Would you ask that again.

Q Defendant's 5, that is the copy of the letter to Bishop nk, was enclosed by you as an enclosure in your letter, being fendant's 4, to Mr. Brangier, isn't that right?

A Yes.

Q Did you ever send the original of Defendant's 5 to shop Bank?

A I don't believe I did.

Q Did you ever deposit $25,000 with Bishop Bank in escrow the year 1958?

A No, I did not.

Q Did you ever deposit $25,000 with Bishop Bank in escrow any time?

A No, I did not.

Q Did you ever deposit $25,000 in escrow with the First tional Bank of Hawaii?

A No, I did not.

Q Did you ever deposit $25,000 in escrow with Milton Cades?

A No, I did not.

* * *

Q (By Mr. Conklin) Did you ever give -- and when I say give" I include the word send -- did you ever give Milton Cades escrow instructions?

A No, I don't think I ever did in the sense -- the true sense of the word.

Q You did deposit $25,000 with your attorney, Vincent Cullinan, didn't you?

A No, I did not.

Q Calling your attention again, Mr. Rosenthal, to the deposition taken in my office on November 30th and December 3rd, 1962, do you recall that that was just a week or ten days ago, isn't that correct?

A Yes.

Q And calling your attention to page 15 thereof, beginning line 6:

"Q But I believe you have testified that you know that the $25,000 was offered many times prior to May, 1961, is that correct?

"A Yes.

"Q Could you tell us when those times were?

"A I can't tell you exactly, but I wrote to Brangier and to Milton Cades and to Jean Solari, and I think that Jean told his colleague, LeJeune, who was the official representative, Mr. Solari, in order to transmit the same information to Brangier, that the money was available at any time, and I believe my attorney, Vincent Cullinan, advised Brangier and others concerned that the money was always available, in fact, on deposit with Cullinan himself, whenever necessary. I can't tell you the exact times but I

elieve it is in the correspondence."

you recall those questions and those answers?

A Yes, I do.

Q And your testimony today is that you did not deposit
he $25,000 with Vincent Cullinan, is that correct?

A That is true, but I had an arrangement with my banker
broker that Mr. Cullinan could draw $25,000 at any time. He
d this authority for a long, long time.

Q And this authority was not merely with regard to this
rticular transaction?

A It was with the special regard to this transaction. It
s an oral agreement, and I believe there was even a written
struction.

Q But he had such authority to withdraw your funds from
ur bank for a long, long, time, is that correct?

A Not from my bank, from my broker or banker.

Q For how long a period has that arrangement been in?

A Well, that is hard to say, because I have had the same
torney for many years.

Q Would you say ten years?

A Oh, I doubt that long. I would say five years, maybe
ven years.

Q You did deposit $25,000 with Jean Solari on Mary 26, 1961,
d you not?

A May what, please?

Q May 26, 1961.

A I don't know the date. I think it was prior to that.

Q Well, if I were to tell you that that was what you said
the deposition, would you say that was right?

A Yes, I would.

Q Would you like me to read the deposition to you where ou used that date?

A No, unless it has some significance.

Q Did you ever deposit $25,000 in escrow with any person ther than your own attorney or agent with regard to the Tahiti ransaction?

A Do you consider Solari my agent?

Q I do, within the framework of that question, yes, sir.

A Then I would say, no, I did not.

Q Did you ever deposit $25,000 in escrow with any person th regard to this Tahiti transaction?

A I deposited with Jean Solari and I made arrangements th my attorney, Vincent Cullinan, which was identical.

Q And your deposit with Solari was when he was acting s your representative in Tahiti, isn't that correct?

A That is correct.

Q So that you never deposited $25,000 with any person other han Solari, is that correct, with regard to this Tahiti trans- tion; is that correct?

A Well, I feel that my attorney, Vincent Cullinan, had hat same authority.

Q Did you ever deposit $25,000 with any person other than ean Solari with regard to the Tahiti transaction?

MR. FLYNN: That is the same question again, if the Court lease. The witness has answered it to the best of his ability. is argumentative now to keep repeating the same question.

THE COURT: It seems to me, Mr. Conklin, that he has pretty

oroughly covered the subject. He has covered the deposit in
y bank and he said he had what he claims to be an arrangement
th the attorney or broker, and he made a deposit with Solari.

MR. CONKLIN: Yes, sir, and then my next question was: "Have
u ever deposited the money with any other person?" And his
nswer was "I made arrangements with Vincent Cullinan." The
uestion was "Have you deposited with anyone other than Solari?"
has not answered that question, and that is why I repeated it.

THE COURT: You can answer it. I will overrule the
bjection.

THE WITNESS: In my opinion, all Vincent Cullinan had to
was pick up the telephone and he would have $25,000. That is
quivalent to a deposit in my opinion.

Q (By Mr. Conklin) Anyone else?

A No, no one else.